No. 08-(1)

IN THE
Supreme Court of the United States

SCOTT DAVID BOWEN,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to jury trial, as applied to the States through the Fourteenth Amendment, allows a criminal conviction based on a non-unanimous jury verdict.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott David Bowen respectfully petitions for a writ of certiorari to the Court of Appeals of Oregon in *State v. Bowen*, No. A129141.

OPINIONS BELOW

The pertinent opinion of the Court of Appeals of Oregon is reported at 215 Or. App. 199, 168 P.3d 1208 (2007), and is reprinted at App. 5a-8a. The Oregon Supreme Court's order denying review of that decision is reported at 197 P.3d 1104 (2008), and is reprinted at Pet. App. 8a.

JURISDICTIONAL STATEMENT

The judgment and opinion of the Oregon Court of Appeals was entered on September 26, 2007. The Oregon Supreme Court denied review of this decision on November 5, 2008. Pet. App. 8a. Justice Kennedy extended the time in which to file this petition until March 4, 2009. See Application 08A543. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

The Oregon Constitution, Article I, section 11, provides, in part:

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict . . . .

Oregon Revised Statutes, § 136.450, provides:

> "(1) Except as otherwise provided in subsection (2) of this section, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors."

STATEMENT OF THE CASE

This case raises an issue that goes to the heart of our Constitution's guarantee that individuals accused of a crime receive certain fundamental procedural protections: namely, whether a jury may convict a defendant of a felony based on a less than unanimous jury verdict. Thirty-six years ago, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), this Court held in a 4-1-4 decision that the Sixth and Fourteenth Amendments do not prohibit States from securing criminal convictions with less that unanimous verdicts. Subsequent legal developments and academic studies call this result into serious question.

1. Oregon law provides, with the sole exception of first degree murder, that the State need persuade only ten of the twelve jurors to vote guilty in order to secure a conviction in a criminal case. OR. REV. STAT § 136.450 (2007). Oregon is one of only two states in the country (the other being Louisiana) that has such a rule.

2. In 2003, petitioner's fifteen-year-old daughter, who court papers refer to as "complainant," ran away from home. Oregon police officers were notified that she was a runaway, and they eventually found her and tried to take her back to petitioner's (and his wife's) home. Complainant, however, resisted, claiming that she was not "any more safe here than I am out there." Upon being pressed as to what that meant, complainant told officers that petitioner had

sexually abused her several times over the past decade. She was unable to pinpoint how old she was when any of the particular events she described allegedly occurred; she estimated the dates within two or three year periods.

The State charged petitioner with five counts of first-degree sexual abuse, two counts of first-degree sodomy, and one count of first-degree rape, all alleged to have occurred between December 30, 1991, and December 4, 2002. Pet. App. 2a-3a. The State did not uncover any physical evidence of these alleged crimes. Instead, the State's charges rested on complainant's accusations. Petitioner disputed the accusations in their entirety, claiming that she had fabricated them in order to gain independence from him and his wife. Accordingly, the prosecution's case turned entirely on credibility issues.

At trial, Petitioner requested a jury instruction requiring a unanimous verdict to convict him of the charges. Pet. App. 5a. Petitioner argued for this instruction on the basis of *Blakely v. Washington*, which recently described the unanimous-jury-conviction requirement as one of the "longstanding tenets of common-law criminal jurisprudence." 542 U.S. 296, 301 (2004). The trial court rejected petitioner's proposed instruction, stating that this language in *Blakely* was mere "dicta," and that "the issue of whether 12 are required in every case was not squarely before the [*Blakely*] court." Pet. App. 7a.

The jury found Petitioner guilty on all eight charges. Pet. App. 3a. Polling revealed that the jury divided 10-2 on each one of the counts. The trial court sentenced petitioner to over seventeen years in prison.

3. The Oregon Court of Appeals affirmed petitioner's conviction, rejecting his argument that it was unconstitutional to convict him of a crime through a non-unanimous verdict. Relying on this Court's 4-1-4 decision in *Apodaca v. Oregon,* 406 U.S. 404 (1972), the appellate court held that "the permissibility of less-than-unanimous jury verdicts under Article I, section 11, [does] not violate the Sixth Amendment to the United States Constitution." Pet. App. 7a.

4. Petitioner sought discretionary review in the Oregon Supreme Court, arguing that convicting him by a non-unanimous jury instruction violated the Sixth and Fourteenth Amendments. The Oregon Supreme Court denied discretionary review without comment. Pet. App. 8a.

REASONS FOR GRANTING THE WRIT

Oregon is one of two states that allows a person to be convicted of a felony by a less than unanimous jury verdict. (Louisiana is the other. *See* La. C. Cr. P. Art. 782.) This practice contravenes centuries of common law, as well as longstanding American precedent, requiring unanimity to convict in criminal cases. Nevertheless, in *Apodaca v. Oregon*, 406 U.S. 404 (1972), a bare majority of this Court – in a

deeply fractured, internally contradictory decision – held that the Constitution does not forbid Oregon and Louisiana from securing convictions by non-unanimous verdicts.

Subsequent developments in this Court's Sixth and Fourteenth Amendment jurisprudence call the result in *Apodaca* into serious question. The two opinions that comprise the five-vote judgment in *Apodaca* use constitutional methodologies that this Court has since abandoned. Worse yet, the result in *Apodaca* is squarely inconsistent with this Court's recent, repeated pronouncements in cases reviewing criminal convictions from state courts that the Sixth Amendment requires "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769)); *accord Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Yet the Oregon and Louisiana state courts have concluded that they are powerless to effectuate *Apodaca*'s demise. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodrigeuez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

This Court should exercise that prerogative now. *Stare decisis* has limited force in this case and the constitutional right at stake is enormously important. Furthermore, as Justice (then Judge) Kennedy has explained:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict.

United States v. Lopez, 581 F.2d 1338, 1341 (9th Cir. 1978). This Court should not allow this fundamental and time-honored protection to be denied any longer.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER THE CONSTITUTION ALLOWS STATES TO SECURE CRIMINAL CONVICTIONS BY NON-UNANIMOUS JURY VERDICTS.

A. This Court's Recent Jurisprudence Has Severely Undercut its Fractured Holding in 1972 that the Constitution Permits Convictions in State Criminal Trials by Non-Unamimous Verdicts.

A comparison between *Apodaca v. Oregon*, 406 U.S. 404 (1972), and this Court's recent Sixth and Fourteenth Amendment jurisprudence demonstrates that the two have become irreconcilable.

1. *Apodaca v. Oregon*

The question whether the Constitution permits a State to convict an individual of a crime based on a non-unanimous jury verdict turns on two sub-issues: (1) whether the Sixth Amendment's jury trial clause requires unanimity for criminal convictions; and (2) if so, whether that constitutional rule applies to the States by means of the Fourteenth Amendment. In *Apodaca*, five Justices answered the first sub-issue affirmatively, and eight answered the second affirmatively (or at least assumed the answer was yes). Yet because of the odd voting patterns in the Court's badly fractured 4-1-4 decision, the Court nevertheless ruled by a bare majority that States may

convict individuals of crimes notwithstanding one or two jurors voting "not guilty."

a. The four-Justice plurality in *Apodaca* acknowledged that it had been "settled" since "the latter half of the 14th century . . . that a verdict had to be unanimous" to convict someone of a crime and that this requirement "had become an accepted feature of the common-law jury by the 18th century." *Id.* at 407-08 & n.2. Indeed, this Court had held or assumed in numerous previous cases that the Sixth Amendment required unanimity for a criminal conviction. *See Andres v. United States,* 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required" where the Sixth Amendment applies); *accord Patton v. United States,* 281 U.S. 276, 288 (1930); *Maxwell v. Dow*, 176 U.S. 581, 586 (1900); *Thompson v. Utah*, 170 U.S. 343, 351 (1898). Justice Story likewise explained in his noted *Commentaries* that any law dispensing with the requirement that jurors "must *unanimously* concur in the guilt of the accused before a legal conviction can be had . . . may be considered unconstitutional." 2 Joseph Story, Commentaries on the Constitution § 1779 n.2 (1891) (emphasis in original). And this Court had long since resolved that the Seventh Amendment's jury trial guarantee for civil trials required unanimity. *See American Pub. Co. v. Fisher,* 166 U.S. 464, 467-68 (1897).

The *Apodaca* plurality nonetheless concluded that the unanimity requirement "was not of constitutional stature" in criminal cases. 406 U.S. at 406. It did so for two primary reasons. First, the plurality

asserted that instead of following history, "[o]ur inquiry must focus upon the *function* served by the jury in contemporary society." *Id.* at 410 (emphasis added). After identifying the jury's function as interposing "the commonsense judgment of a group of laymen" between the accused and his accuser, the plurality found that "[i]n terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." *Id.* at 410-11 (quotation omitted).

Second, in response to Apodaca's argument that the Sixth Amendment requires jury unanimity in part "to give effect of the reasonable-doubt standard," the plurality asserted that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." *Id.* at 412. "We are quite sure," the plurality emphasized, "that the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." *Id.* at 411.

b. Justice Powell provided a fifth vote by concurring in the plurality judgment. He did so, however, by disagreeing with the plurality on both sub-issues presented in the case. In his joint opinion in *Apodaca* and a companion case, Justice Powell stated that he believed, "in accord with both history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial." *Johnson v. Louisiana,* 406 U.S. 366, 371 (1972) (Powell, J., concurring in the judgment). But he also expressly rejected the plurality's "major premise" that "the concept of jury trial, as applicable

to the States under the Fourteenth Amendment, must be identical in every detail to the concept required by the Sixth Amendment." *Id.* at 369. "Viewing the unanimity controversy as one requiring a fresh look at the question of what is fundamental in jury trial," Justice Powell found "no reason to believe . . . that a unanimous decision of 12 jurors is more likely to serve the high purpose of jury trial, or is entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 374, 376.

c. The four dissenters objected to the Court's judgment as a "radical departure from American traditions." *Johnson,* 406 U.S. at 381 (Douglas, J., dissenting). The dissenters bemoaned the plurality's decision to abandon the previously "universal[] understanding that a unanimous verdict is an essential element of a Sixth Amendment jury trial." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting); *see also Johnson,* 406 U.S. at 395 (Brennan, J., dissenting); *id.* at 399 (Marshall, J., dissenting). The dissenters also disagreed with Justice Powell's rejection of the settled rule that the Sixth Amendment's jury trial guarantee "is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca,* 406 U.S. at 414 (Stewart, J., dissenting) (emphasis added).

As Justice Brennan summed up the situation:

> Readers of today's opinions may be understandably puzzled why convictions by 11-1 and 10-2 jury votes are affirmed in [*Apodaca*],

> when a majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment. The reason is that while my Brother Powell agrees that a unanimous verdict is required in federal criminal trials, he does not agree that the Sixth Amendment right to a jury trial is to be applied in the same way to State and Federal Governments.

Johnson v. Louisiana, 406 U.S. at 395 (Brennan, J., dissenting).

2. This Court's Current Sixth Amendment Jurisprudence

This Court's modern approach to Sixth Amendment jurisprudence renders *Apodaca* anachronistic. In fact, all three theoretical predicates on which the plurality and Justice Powell's opinions are based have been substantially undercut – if not brought directly into disrepute – by this Court's recent Sixth Amendment decisions.

a. While the *Apodaca* plurality focused "upon the function served by the jury in contemporary society," 406 U.S. at 410, this Court recently has made clear that the Sixth Amendment derives its meaning not from functional assessments of the Amendment's purposes but rather from the original understanding

of the guarantees contained therein. In *Crawford v. Washington,* 541 U.S. 36 (2004), this Court abandoned the functional, reliability-based conception of the Confrontation Clause conceived in *Ohio v. Roberts,* 448 U.S. 56 (1980), in favor of the common-law conception of the right known to the Framers. In *Giles v. California*, 128 S. Ct. 2678 (2008), this Court continued that trend, explaining that "[i]t is not the role of courts to extrapolate from the words of the Sixth Amendment to the values behind it, and then to enforce its guarantees only to the extent they serve (in the court's views) those underlying values. The Sixth Amendment seeks fairness indeed—but seeks it through very specific means . . . that were the trial rights of Englishmen." *Id.* at 2692. In *United States v. Gonzalez-Lopez,* 548 U.S. 140 (2006), this Court similarly rejected an approach to the right to counsel that would have "abstract[ed] from the right to its purposes" and left it to this Court whether to give effect "to the details." *Id.* at 145 (quotation omitted).

Most importantly, in a line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court has eschewed a functional approach to the right to jury trial in favor of the "practice" of trial by jury as it existed "at common law." *Id.* at 480. In the course of holding that all sentencing factors that increase a defendant's potential punishment must be proven to a jury beyond a reasonable doubt, this Court emphasized that "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." *Blakely v. Washington*, 542 U.S. 296, 313

(2004). Rather, the controlling datum is "the Framers' paradigm for criminal justice." *Id.*

This pronounced shift in constitutional methodology itself – the return to historical analysis – calls *Apodaca* into serious question. But this Court has gone further. In the *Apprendi* line of cases, this Court explicitly has reaffirmed that the "longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment embodies include the rule "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (emphasis added) (quoting William Blackstone, Commentaries on the Laws of England *343 (1769). This Court further explained in *Booker v. United States*:

> More important than the language used in our holding in *Apprendi* are the principles we sought to vindicate. . . . As we noted in *Apprendi*:
>
> "[T]he historical foundation for our recognition of these principles extends down centuries into the common law. '[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the *unanimous*

> suffrage of twelve of [the defendant's] equals and neighbours . . . .'"

543 U.S. 220, 238-39 (2005) (second emphasis added) (quotation omitted); *see also Apprendi*, 530 U.S. at 498 (Scalia, J., concurring) (charges against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*") (emphasis in original).

The *Apodaca* plurality's functional view of the Sixth Amendment cannot be squared with these repeated, historically based pronouncements.

b. This Court similarly has disregarded the *Apodaca* plurality's assertion that "the Sixth Amendment does not require proof beyond a reasonable doubt at all." 406 U.S. at 412. In *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993), this Court unanimously held:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [*In re Winship*, 397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. *In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.*

Sullivan, 508 U.S. at 278 (second emphasis added). The *Sullivan* Court concluded that a defendant's "Sixth Amendment right to jury trial" is "denied" when a jury instruction improperly defines the concept of reasonable doubt. *Id.*

This Court likewise explained in *Cunningham v. California*, 127 S. Ct. 856 (2007) – another case applying the *Apprendi* rule to a state sentencing system – that "[t]his Court has repeatedly held that, *under the Sixth Amendment*, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, *and established beyond a reasonable doubt*, not merely by a preponderance of the evidence." *Id.* at 863-64 (emphasis added).

It takes little reflection to perceive that the holdings and reasoning in *Sullivan* and *Cunningham* are in serious tension with the plurality's reasoning in *Apodaca*. The pronouncements respecting the Sixth Amendment in all three cases cannot all be right.

c. Justice Powell's non-incorporation analysis cannot withstand scrutiny either. Even when *Apodaca* was decided, Justice Powell's notion of applying a clause in the Bill of Rights in a piecemeal manner to state proceedings was difficult to square with this Court's previous "reject[ion of] the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *Malloy v. Hogan*, 378 U.S. 1, 10-11 (1964) (quoting

Ohio ex rel. Eaton v. Price, 364 U.S. 263, 275 (1960)). But whatever its viability in 1972, this Court's modern Sixth Amendment jurisprudence has long since rendered Justice Powell's "partial incorporation" methodology untenable. In *Crist v. Bretz,* 437 U.S. 28 (1978), the state argued that a particular aspect of the Fifth Amendment's double jeopardy guarantee should not be incorporated against the States. Although Justice Powell agreed with this argument, this Court rejected it, holding that when a component of the Bill of Rights that applies against the States is "a settled part of constitutional law" and protects legitimate interests of the accused, it must apply with equal force to the States. *Id.* at 37-38.

The *Crist* case, decided thirty years ago, dispensed with any possibility of Justice Powell's views ever gaining sway on this Court. "In the years since *Crist*, . . . [n]o member of the Court has suggested . . . that [a] particular requirement might not be constitutionally demanded for state proceedings while constitutionally mandated in federal proceedings. . . . Thus, absolute parallelism seems to be a settled principle." Wayne R. LaFave et. al, Criminal Procedure § 2.6(c), at 67-68 (4th ed. 2004).

This Court's modern Sixth Amendment decisions are fully consistent with this observation. In *Apprendi*, *Ring v. Arizona*, 536 U.S. 584 (2002), *Blakely*, and *Cunningham*, this Court applied the *Apprendi* rule to state proceedings without even pausing to consider whether that aspect of the right

to trial by jury applied to the States. This Court, in recent years, has proceeded in the same holistic manner with respect to the Sixth Amendment's Confrontation Clause, *see Crawford,* 541 U.S. 36; *Davis v. Washington,* 547 U.S. 813 (2006); the right to counsel, *Alabama v. Shelton,* 535 U.S. 654 (2002); *Strickland v. Washington,* 466 U.S. 669 (1984); and the right to compulsory process, *Pennsylvania v. Ritchie,* 480 U.S. 39 (1987). Justice Powell's controlling methodology in *Apodaca* stands as the sole exception to decades of otherwise unbroken precedent.[1]

Even if the question here were still fundamentally considered one of due process, Justice Powell's analysis would contradict this Court's modern case law. Justice Powell approached the incorporation in *Apodaca* as depending on a "fresh look" at what elements of the right to jury trial are essential. 406 U.S. at 376. This Court, however, has made clear in recent decisions that due process does not depend upon the subjective views of individual Justices regarding the importance or desirability of given practices. Rather, the "crucial guideposts" in due process cases are now "[o]ur Nation's history, legal traditions, and practices." *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (quotation

[1] To be sure, this Court has held that some guarantees in the Bill of Rights, such as the Fifth Amendment's Grand Jury Clause, do not apply to the States at all. *See Beck v. Washington,* 369 U.S. 541, 545 (1962); *Hurtado v. California,* 110 U.S. 516 (1884). But Justice Powell's opinion in *Apodaca* stands alone as holding that a component of the Bill of Rights that *does* apply to state proceedings does not apply in the same manner, or with the same force, as in federal trials.

omitted); *see also Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion) (due process requires adherence to rights that are "deeply rooted in this Nation's history and tradition"). As even Justice Powell recognized, those historical guideposts demonstrate that at the time of the Founding, "unanimity had long been established as one of the attributes of a jury conviction." *Johnson*, 406 U.S. at 371 (Powell, J., concurring in the judgment in *Apodaca*); *see also supra* at 8 (collecting other historical citations). That reality should settle the question.

B. The Doctrine of *Stare Decisis* Does Not Pose a Significant Impediment to Reconsidering the Question Presented Afresh.

For three reasons, the doctrine of *stare decisis* should not stand in the way of this Court's reconsidering the result in *Apodaca* in light of this Court's recent approach to the Sixth Amendment.

1. Principles of *stare decisis* are at their nadir where a case results in a plurality opinion because no five Justices are able to muster a controlling view concerning the law. In *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), for example, this Court reconsidered and overturned a prior decision – *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) – in part because a majority of the Court (the concurring opinion providing the fifth vote, as well as the dissent) had "expressly disagreed with the rationale of the plurality." *Id.* at 66.

The same is true here. *Apodaca* was a deeply fractured decision. Both Justice Powell's concurrence and the four dissenters expressly disagreed with the plurality's view that the Sixth Amendment does not require unanimous verdicts to convict. Furthermore, the eight other Justices on the Court disagreed with Justice Powell's "partial incorporation" rationale. *Apodaca,* therefore, is entitled only to "questionable precedential value." *Seminole Tribe,* 517 U.S. at 66.

2. *Stare decisis* has minimal force when the decision at issue "involves collision with prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock,* 309 U.S. 106, 119 (1940). Indeed, "[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 231 (1995). When faced with such situations, therefore, this Court repeatedly has determined that the better course is to reinstate the prior, traditional doctrine. *See id.* at 231-32; *United States v. Dixon,* 509 U.S. 688, 704 (1993) (overruling recent decision that "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987) (overruling decision that had broken from an earlier line of decisions "from 1866 to 1960"); *Continental T.V., Inc., v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-48 (1977) (overruling case that was "an abrupt and largely unexplained departure" from

precedent); *Swift & Co. v. Wickham*, 382 U.S 111, 128-29 (1965) (overruling recent decision to reinstate the "view . . . which this Court ha[d] traditionally taken" in earlier cases).

As Justice Powell and the dissenters in *Apodaca* noted without contradiction from the plurality, the plurality's view that the Sixth Amendment does not require unanimity broke sharply from "an unbroken line of cases reaching back to the late 1800's" – and, indeed, from hundreds of years of common law practice. *Johnson*, 406 U.S. at 369 (Powell, J., concurring in the judgment in *Apodaca*); *see also Apodaca*, 406 U.S. at 414-15 (Stewart J., dissenting) ("Until today, it has been universally understood that a unanimous verdict is an essential element of a Sixth Amendment jury trial. . . . I would follow these settled Sixth Amendment precedents and reverse the judgment before us.") (citations omitted). Justice Powell's "partial incorporation" rationale likewise ignored this Court's prior precedent that "the Sixth Amendment right to trial by jury in a federal criminal case is made *wholly* applicable to state criminal trials by the Fourteenth Amendment." *Apodaca*, 406 U.S. at 414 (Stewart J., dissenting) (emphasis added); *see also supra,* at 10. Overruling *Apodaca*, therefore, would do nothing more than reinstate the traditional meaning of the Sixth and Fourteenth Amendments. It also would extinguish the schism with this Court's longstanding Seventh Amendment jurisprudence requiring unanimity in civil cases.

3. *Stare decisis* considerations also wane considerably "in cases . . . involving procedural and evidentiary rules," in part because such rules generally do not induce the same kinds of individual or societal reliance as other kinds of legal doctrines. *Payne v. Tennessee*, 501 U.S. 808, 827-28 (1991). Such is the case here. The rules governing juror voting are quintessentially procedural rules. What is more, in the thirty-seven years since *Apodaca* was decided, not a single state has retreated from its requirement that jury verdicts be unanimous to convict in criminal cases. Louisiana and Oregon remain the sole outliers, in exactly the same position as they were in 1972. And no other constitutional doctrine or legislation depends on the continued validity of *Apodaca*. To the contrary, *Apodaca* is an increasingly unexplainable anomaly in this Court's constitutional criminal-procedure jurisprudence.

C. The Question Whether States May Continue to Convict Individuals of Serious Crimes Based on Non-Unanimous Verdicts is Extremely Important and Ripe for Consideration.

1. Empirical research conducted since *Apodaca* confirms the wisdom of the historical unanimity requirement and highlights the importance of enforcing that constitutional mandate.

a. The *Apodaca* plurality defended its decision in part based on an assumption that a unanimity requirement "does not materially contribute to the

exercise" of a jury's "commonsense judgment." 406 U.S. at 410. The plurality hypothesized:

> [W]e perceive no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one. Requiring unanimity would obviously produce hung juries in some situations where nonunanimous juries will convict or acquit. But in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served.

Id. at 411 (footnote omitted).

Evidence amassed from both mock juries and actual Arizona jury deliberations occurring over the last half-century reveals that the plurality's assumptions were incorrect. Specifically, "[s]tudies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots." American Bar Association, American Jury Project, *Principles for Juries and Jury Trials*, at 24, available at http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf (last accessed February 27, 2009). As Professors Shari Seidman Diamond, Mary R. Rose, and Beth Murphy explain:

> The Arizona jury deliberations reveal that some of the claims made in favor of dispensing

> with unanimity are unfounded. The image of eccentric holdout jurors outvoted by sensible majorities receives no support. Indeed, the judge agreed with the verdict favored by the holdouts in a number of these cases. Instead, the deliberations demonstrate that thoughtful minorities are sometimes marginalized when the majority has the power to ignore them in reaching a verdict. Although juries generally engage in serious and intense deliberations, jurors themselves report more thorough and open-minded debate when they reach unanimity.
>
> The primary cost frequently attributed to the unanimity requirement is that it increases the rate of hung juries, a cost that seems overblown in light of the low frequency of hung juries in civil cases, even when unanimity is required. More importantly, a slight increase in hung juries and the potential for a longer deliberation may be costs outweighed by the benefits of a tool that can stimulate robust debate and potentially decrease the likelihood of an anomalous verdict.

Shari Seidman Diamond, et al., *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. REV. 201, 230 (2006). Other scholars have reached similar conclusions. *See* Kim Taylor Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272 (2000) (noting "[a] shift to majority rule appears to

alter both the quality of the deliberative process and the accuracy of the jury's judgment"); John Guinther, The Jury in America 81 (1988) (finding that non-unanimous juries correct each other's errors of fact less frequently than do juries required to reach unanimity).

b. The *Apodaca* plurality further assumed that allowing non-unanimous verdicts would not marginalize jurors who are members of minority groups. 406 U.S. at 413. This assumption also appears misguided. After considering the effect of non-unanimity rules on dissenting voices, the American Bar Association's American Jury Project concluded that "[a] non-unanimous decision rule allows juries to reach a quorum without seriously considering minority voices, thereby effectively silencing those voices and negating their participation." *See* Principles for Juries and Jury Trials, *supra*, at 24. Empirical studies corroborate the observation that jurors who have divergent views contribute more vigorously to jury deliberations when operating under a unanimous verdict scheme. *See id.*; Reid Hastie et al., Inside the Jury 108-12 (1983). It thus comes as no surprise that members of racial and ethnic minorities are often the ones who are outvoted in non-unanimous verdicts. *See, e.g., State v. Potter*, 591 So. 2d 1166, 1167 (La. 1991) ("The vote was eleven to one with the sole 'not guilty' vote cast by one of the black members of the jury. Eleven blacks were peremptorily challenged by the state during voir dire . . . ."). Such verdicts-by-majority-rule undermine the public credibility of our judicial system. *See* Kim Taylor-Thompson, *Empty Votes in*

Jury Deliberations, 113 HARV. L. REV. 1261, 1278 (2000).

The comprehensive empirical research affirming the wisdom of the unanimity requirement, as well as the disproportionately negative impact of non-unanimity rules on jurors of color, led the American Bar Association to conclude that "[a] unanimous decision should be required in all criminal cases heard by a jury." *Principles for Juries and Jury Trials*, *supra*, at 23. Numerous other organizations and commentators have concluded the same. *See, e.g.*, Dennis J. Divine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001) (reviewing all available social science and concluding that laws allowing non-unanimous verdicts have a significant effect when prosecution's case "is not particularly weak or strong").

c. Finally, Justice Powell rebuffed concerns from the *Apodaca* dissenters that allowing non-unanimous verdicts would weaken the beyond-a-reasonable-doubt rule by asserting "[t]rial judges also retain the power to . . . set aside verdicts once rendered when the evidence is insufficient to support a conviction." 406 U.S. at 379. Yet the Oregon Supreme Court has now made clear that Oregon trial judges actually lack this power. In the Oregon Supreme Court's view, setting aside a verdict in such circumstances "would be the equivalent of entering a judgment notwithstanding a verdict, which is not available in criminal proceedings." *State v. Metcalfe*, 974 P.2d 1189, 1192 (Or. 1999); *accord State v. Peekema*, 976

P.2d 1128, 1132 (Or. 1999); *State ex rel. Redden v. Davis,* 604 P.2d 879, 882-83 (1980). One of the safety nets on which Justice Powell relied in casting his vote, therefore, simply does not exist.

2. The consequences of Oregon and Louisiana continuing to allow criminal convictions based on non-unanimous jury verdicts are serious and will continue until this Court steps in. It is not at all uncommon for defendants in these states to be convicted by non-unanimous verdicts. Over the past five years alone, the Oregon courts have noted fifteen cases in which defendants were convicted of felonies by non-unanimous verdicts[2] – a number that substantially undercounts the frequency of such verdicts. Juries are not polled as a matter of course in Oregon. Additionally, most Oregon criminal convictions are "affirmed without opinion" by courts of review. Even when Oregon courts do issue opinions, the jury vote is not necessarily reported.

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[2] *See* Pet. App. 5a; *State v. Camacho-Alvarez*, No. C062071CR, 2009 WL 32522 (Or. App. Jan. 7, 2009); *State v. Cobb*, 198 P.3d 978, 979 (Or. App. 2008); *State v. Jones*, 196 P.3d 97, 104 (Or. App. 2008); *State v. Smith*, 195 P.3d 435, 436 (Or. App. 2008); *State v. Perkins*, 188 P.3d 482, 484 (Or. App. 2008); *Simpson v. Coursey*, 197 P.3d 68, 71 (Or. App. 2008); *Wyatt v. Czerniak*, 195 P.3d 912, 916 (Or. App. 2008); *State v. Cave*, 195 P.3d 446, 448 (Or. App. 2008); *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Moller*, 174 P.3d 1063, 1064 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 601 (Or. App. 2007); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. O'Donnell*, 85 P.3d 323, 326 (Or. App. 2004).

During the same period, the Louisiana appellate courts have noted over forty such cases.[3]

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[3] *See State v. Lee*, 964 So. 2d 967 (La. App. 2007), *cert. denied*, 129 S. Ct. 130 (2008); *State v. Ruiz*, 955 So. 2d 81, 83 (La. 2007); *State v. Elie*, 936 So. 2d 791, 794 (La. 2006); *State v. Mizell*, 938 So. 2d 712, 713 (La. App. 2006); *State v. Mack*, No. 43-KA-206, 2008 La. App. LEXIS 585 (La. App. Apr. 23, 2008); *State v. Brantley*, 975 So. 2d 849, 851 (La. App. 2008); *State v. Gullette*, 975 So. 2d 753, 758 (La. App. 2008); *State v. Linn*, 975 So. 2d 771, 772 (La. App. 2008); *State v. Carter*, 974 So. 2d 181, 184 (La. App. 2008); *State v. Ross*, 973 So. 2d 168, 171 (La. App. 2007); *State v. Baker*, 962 So. 2d 1198, 1201 (La. App. 2007); *State v. Allen*, 955 So. 2d 742, 746 (La. App. 2007); *State v. Tensley*, 955 So. 2d 227, 231 (La. App. 2007); *State v. Johnson*, 948 So. 2d 1229, 1239 (La. App. 2007); *State v. Williams*, 950 So. 2d 126, 129 (La. App. 2007); *State v. Mayeux*, 949 So. 2d 520, 535 (La. App. 2007); *State v. Brown*, 943 So. 2d 614, 620 (La. App. 2006); *State v. Payne*, 945 So. 2d 749, 750 (La. App. 2006); *State v. Riley*, 941 So. 2d 618, 622 (La. App. 2006); *State v. Chandler*, 939 So. 2d 574, 576 (La. App. 2006); *State v. Smith*, 936 So. 2d 255, 259 (La. App. 2006); *State v. Davis*, 935 So. 2d 763, 766 (La. App. 2006); *State v. Scroggins*, 926 So. 2d 64, 65 (La. App. 2006); *State v. Houston*, 925 So. 2d 690, 706 (La. App. 2006); *State v. Christian*, 924 So. 2d 266 (La. App. 2006); *State v. Zeigler*, 920 So. 2d 949, 952 (La. App. 2006); *State v. Wilhite*, 917 So. 2d 1252, 1258 (La. App. 2005); *State v. Hurd*, 917 So. 2d 567, 568 (La. App. 2005); *State v. Wiley*, 914 So. 2d 1117, 1121 (La. App. 2005); *State v. Bowers*, 909 So. 2d 1038, 1043 (La. App. 2005); *State v. Dabney*, 908 So. 2d 60, 65 (La. App. 2005); *State v. Jackson*, 904 So. 2d 907, 909 (La. App. 2005); *State v. Williams*, 901 So. 2d 1171, 1177 (La. App. 2005); *State v. Jackson*, 892 So. 2d 71, 73 (La. App. 2004); *State v. King*, 886 So. 2d 598 (La. App. 2004); *State v. Nguyen*, 888 So. 2d 900, 904 (La. App. 2004); *State v. Tauzin*, 880 So. 2d 157, 158 (La. App. 2004); *State v. Shrader*, 881 So. 2d 147, 150 (La. App. 2004); *State v. Williams*, 878 So. 2d 765, 778 (La. App. 2004) (Thibodeaux, J. dissenting); *State v. Guiden*, 873 So. 2d 835, 837 (La. App. 2004); *State v. Brown*, 874 So. 2d 318, 328 (La. App. 2004); *State v. Harris*, 868 So. 2d 886, 890 (La. App. 2004); *State v. Moore*, 865 So. 2d 227, 232 (La. App. 2004).

Defendants repeatedly have challenged the holding in *Apodaca* in recent years, and they continue to do so. But the Oregon and Louisiana intermediate appellate courts continually tell these defendants that only this Court can declare that *Apodaca* is no longer good law, and the Oregon and Louisiana Supreme Courts continue to deny discretionary review of the issue. *See* Pet. App. 5a-7a, 8a; *State v. Pereida-Alba,* 189 P.3d 89 (Or. App. 2007), *rev. denied,* 197 P.3d 1104 (Or. 2008)[4]; *State v. Miller*, 166 P.3d 591, 599 (Or. App. 2007), *opinion modified on reh'g*, 176 P.3d 425 (Or. App. 2008); *State v. Phillips*, 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman*, 174 P.3d 598, 604 (Or. App. 2007); *State v. Rennels*, 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. Lee,* 964 So. 2d 967 (La. App. 2007), *writ denied,* 977 So. 2d 896 (La. 2008), *cert. denied,* 128 S. Ct. 130 (2008); *State v. Smith*, 952 So. 2d 1, 16 (La. App. 2006), *writ denied*, 964 So. 2d 352 (La. 2007); *State v. Newman*, 2006 WL 3813692, at *5 (La. App. 2006) (unpublished opinion); *State v. Caples*, 938 So. 2d 147, 157 (La. App. 2006), *writ denied*, 955 So. 2d 684 (La. 2007); *State v. Juniors*, 918 So. 2d 1137, 1147-48 (La. App. 2005), *writ denied*, 936 So. 2d 1257 (La. 2006), *cert. denied*, 127 S. Ct. 1293 (2007); *State v. Divers*, 889 So. 2d 335, 353 (La. App. 2004), *writ. denied*, 899 So. 2d 2 (La. 2005), *cert. denied*, 546 U.S. 939 (2005); *State v.*

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[4] In *Pereida-Alba,* as in this case, several groups, including the National Association of Criminal Defense Lawyers (NACDL), urged the Oregon Supreme Court to consider this issue. *See* 2008 WL 4255140 (NACDL brief). The Oregon Supreme Court denied review without comment.

Sharp, 810 So. 2d 1179, 1193-94 (La. App. 2002), *writ denied*, 845 So. 2d 1081 (La. 2003). And because the nonunanimity rules in both Oregon and Louisiana are based on state constitutions, defendants cannot seek change on state law grounds.

The time has come for this Court to address the disjunction between *Apodaca* and this Court's more recent, historically grounded, view of the Sixth Amendment. No further percolation will occur in trial or appellate courts. Neither the Oregon nor the Louisiana Supreme Court is willing to confront the issue. Nor is any further empirical research necessary. Two states in our Union have simply decided to violate criminal defendants' fundamental right to jury trial until this Court tells them they may no longer do so.

D. This Case Is an Ideal Vehicle for Reconsidering *Apodaca*.

Petitioner is aware that this Court recently denied certiorari in another case presenting this same issue: *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523). This Court did the same in *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449). In *Lee*, a wide array of groups filed *amicus* briefs supporting certiorari: the American Bar Association, the National Association of Criminal Defense Lawyers, the Louisiana Association of Criminal Defense Lawyers, the Charles Hamilton Institute for Race and Justice, and the Federal Public Defender for the

District of Oregon.[5] These groups argued in various ways that condoning non-unanimous verdicts in criminal cases severely hampers the fair administration of justice and, indeed, the public perception of justice.

The strength of the collective plea in *Lee* suggests this is a pressing issue that is not going to go away. And for three reasons, this case presents a better vehicle than *Lee* or *Howard* – indeed, an ideal vehicle – for considering whether our Constitution should continue to tolerate felony convictions by less than unanimous verdicts.

1. This case places the problems associated with allowing less than unanimous verdicts in unusually stark relief. The crimes with which the State charged petitioner, child rape and sexual abuse, are extraordinarily serious – so serious that they may "overwhelm" the judgment of even fair minded jurors. *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2661 (2008). At the same time, "[t]he problem of unreliable, induced, even imagined child testimony means there is a special risk of wrongful [conviction] in some child rape prosecutions" – particularly prosecutions, such as this one, *see supra* at 3-4, that lack physical evidence of guilt and thus depend on the alleged victim for "the central narrative and account of the crime[s]." *Id.* at 2663; *see also Ex Parte Thompson*, 153 S.W.3d 416, 422 (Tex. Crim. 2005) (Cochran, J., concurring) (explaining that

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[5] Petitioner understands that copies of these briefs remain available in the clerk's office. They also are available online on the Westlaw page that reports the denial of certiorari in *Lee*.

when child rape prosecutions "are 'he said, she said' cases that ultimately rely on the jury's assessment of the relative credibility of opposing witnesses," "it is virtually impossible for the jury not to make an occasional credibility mistake"). Consequently, the need at petitioner's trial for stringent and dependable procedural safeguards was at its zenith.

Yet Oregon's non-unanimity rule provided petitioner anything but stringent protection. Despite the fact that two jurors (nearly 20% of the jury) concluded that petitioner was not guilty of the charges, the State's judicial system judged him guilty; sentenced him to over seventeen years in prison; and branded him a "sex offender" for the rest of his life. A Louisiana prosecutor has commented that when ten of twelve jurors find a defendant guilty of a serious crime, "that's beyond a reasonable doubt." Marcia Coyle, *Divided on Unanimity,* Nat'l L.J., Sept. 1, 2008, at 1. This Court should promptly rebuke that view, which misapprehends not only legal theory but the "effect" of dispensing with the unanimity requirement "on the fact-finding process." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

2. Unlike Mr. Lee, who was under a death sentence in a separate case from the one in which he sought review, *see Lee v. Louisiana,* 129 S. Ct. 130 (2008) (No. 07-1536), petitioner would unquestionably benefit from a favorable decision in his case. The jury divided 10-2 on each of the counts involved. And petitioner is not subject to any other judgments or sentences.

3. Finally, this case aptly demonstrates the fact, as indicated above, that non-unanimous verdicts are an unfortunately common occurrence in Oregon and Louisiana. Unless and until this Court addresses the issue, this Court will continue to receive petitions on the subject and uncertainty will reign. Better to grant review now and to put the question to rest.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

COURT OF APPEALS OF OREGON

STATE OF OREGON, Plaintiff-Respondent,
v.
SCOTT DAVID BOWEN,Defendant-Appellant.

A129141; 040935242

On Appellant's Petition for Reconsideration
Feb. 14, 2008

Decided June 11, 2008.

Before HASELTON, Presiding Judge, and
ARMSTRONG, Judge, and ROSENBLUM, Judge.

HASELTON, P.J.

Defendant petitions for reconsideration in this criminal case, arguing that we erred in rejecting his challenge to consecutive sentences based on the rule of law announced in *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that facts used to enhance a penalty for a crime, other than prior convictions or facts admitted by the defendant, must be found by a jury beyond a reasonable doubt. *State v. Bowen*, 168 P.3d 1208 (Or. App. 2007) (relying on *State v. Tanner*, 150 P.3d 31 (Or. App. 2006), *rev. allowed*, 173 P.3d 831 (Or. 2007).[1]

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[1] We rejected two additional assignments of error raised by defendant. Our disposition of those assignments of error is not at

Defendant notes that, subsequent to our affirmance of his sentence, the Oregon Supreme Court held that the rule of law from *Apprendi* and *Blakely* applied to facts used to support consecutive sentences. *See State v. Ice*, 170 P.3d 1049 (Or. 2007), *cert. granted*, 128 S. Ct. 1657 (2008).

The state, while maintaining that *Ice* was decided incorrectly, acknowledges that *Ice* is controlling here as to the legal principle, but urges this court to nonetheless affirm defendant's sentence on the ground that any error in failing to obtain a jury finding in support of consecutive sentences was "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18 (1967). *See Washington v. Recuenco*, 548 U.S. 212 (2006) (*Apprendi* error and failing to submit sentence-enhancement facts to a jury is not "structural error" and is subject to federal harmless-error analysis); *State v. Bray*, 160 P.3d (Or. 2007) (applying federal harmless-error formulation in determining that *Apprendi/Blakely* error was not harmless: "[W]e cannot say that no reasonable juror could draw any conclusion other than [the existence of the enhancing factor] from this record.").

In this case, defendant was charged with five counts of first-degree sexual abuse, ORS 163.427, and one count of first-degree sodomy, ORS 163.405, alleged to have occurred between December 30, 1991 and December 29, 2000. Defendant further was charged with an additional count of first-degree sodomy, as well as first-degree rape, alleged to have occurred

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issue on reconsideration. Accordingly, we adhere to our former opinion with respect to those assignments of error.

between December 29, 2000 and December 4, 2002. A jury found defendant guilty on all charges. Over the defendant's objection that *Blakely* required jury findings in support of consecutive sentences, the sentencing court found that none of the crimes arose from a continuous and uninterrupted course of conduct, ORS 137.123(2), and imposed consecutive sentences on four of the crimes.

On appeal, defendant assigned error to the court's imposition of consecutive sentences, arguing that judicial factfinding in support of consecutive sentences under ORS 137.123(2) runs afoul of *Blakely* and *Apprendi*. As noted, that is correct. *See Ice*, 170 P.3d 1049.

The state responds that the error was harmless beyond a reasonable doubt, because the testimony of the victim of the offenses "clearly established that each of the offenses was a separate incident; that is, they each occurred at different times and at different locations over a period of years." *See generally State v. Cook*, 135 P.3d 260 (Or. 2006) (describing federal constitutional harmless standard).

We agree with the state. A detailed discussion of the facts would be of no benefit to the bench, the bar, or the public. Suffice it to say that the evidence at trial established eight incidents of sexual contact between defendant and the victim, which occurred when the victim was between the ages of approximately six and 15. Those incidents, as demonstrated by overwhelming evidence in the record, were so distinct from one another that we can say with complete confidence that the jury would have found

that the offenses did not occur as part of a continuous and uninterrupted course of conduct if it had been asked to determine that matter. That is, on this record, no reasonable factfinder could have determined otherwise. Accord *Neder v. United States*, 527 U.S. 1 (1999) (determining that failure to submit an element of an offense to the jury was "harmless beyond a reasonable doubt" where "no jury could reasonably find" that the government had failed to prove that element). Accordingly, because the asserted error was harmless beyond a reasonable doubt, we affirm.

Reconsideration allowed; former opinion modified and adhered to as modified.

APPENDIX B

COURT OF APPEALS OF OREGON

STATE OF OREGON, Plaintiff-Respondent,
v.
SCOTT DAVID BOWEN, Defendant-Appellant.

040935242; A129141.

Submitted on Record and Briefs
Aug. 28, 2007

Decided Sept. 26, 2007.

Before HASELTON, Presiding Judge, and
ARMSTRONG and ROSENBLUM, Judges.

HASELTON, P.J.

Defendant appeals his conviction for multiple felony sex offenses. He assigns error to (1) the denial of his motion for mistrial, (2) the trial court's refusal to instruct the jury that it could convict as to each of the charges only upon a unanimous verdict, and (3) the imposition of consecutive sentences based on judicial findings. We reject the first assignment of error without discussion and the third assignment of error based on the reasoning of *State v. Tanner*, 150 P.3d 31 (Or. App. 2006). For the reasons that follow, we also reject defendant's asserted entitlement to a jury unanimity instruction. Accordingly, we affirm.

Article I, section 11, of the Oregon Constitution provides, in part, that

> "in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by unanimous verdict, and not otherwise[.]"

Notwithstanding that provision, defendant requested that the jury be instructed as follows: "This being a criminal case, each and every juror must agree on your verdict." Defendant argued, generally, that the instruction comported with – and, indeed, was compelled by – the following observation in *Blakely v. Washington*, 542 U.S. 296, 301 (2004):

> "This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) * * *."

The trial court rejected the proposed instruction:

> "Yes, I can't give that. That wouldn't comply with Oregon law so I'm not going to do that.
>
> "* * * *
>
> "THE COURT: I don't think *Blakely* actually speaks to this – *Blakely* wasn't really a decision that was addressing that special issue. It was addressing, of course, whether

> or not a jury should weigh in on factors that related to enhancements of sentencing. * * *
>
> " * * * * *
>
> "THE COURT: * * * [That statement] is in a sense a form of dicta. In other words, the issue of whether 12 are required in every case was not squarely before the court. And this was a sentence with which I'm familiar because, of course, I'm familiar with *Blakely* * * * but [it's] in the context [of] an entirely different issue.
>
> "I don't read this as a decision by the United States Supreme Court that every state must have * * * unanimous verdicts."

On appeal, defendant reiterates his "jury unanimity" contention. Necessarily implicit in defendant's argument is the premise that the Court's observation in *Blakely* had the effect of overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972). In *Apodaca*, the Court held that the permissibility of less-than-unanimous jury verdicts under Article I, section 11, did not violate the Sixth Amendment to the United States Constitution. *Apodaca*, 406 U.S. at 407-14.[1]

Affirmed.

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[1] Very recently, in *State v. Miller*, 166 P.3d 591 (Or. App. 2007), we rejected an unpreserved challenge identical to defendant's, concluding that, given *Apodaca*, the failure to give a "unanimous verdict" instruction was, at the very least, not error apparent on the face of the record.

APPENDIX C

SUPREME COURT OF OREGON

STATE
v.

SCOTT DAVID BOWEN

Nos. A129141, S056298

November 05, 2008

220 Or. App. 380, 185 P.3d 1129

DENIED.